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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 835

D. H. OVERMYER WAREHOUSE CO., INC., an Ohio Corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware Corporation, and LIBERTY MUTUAL INSURANCE CO., a Massachusetts Corporation,
Petitioners,

vs.

FLORIDA STEEL CORPORATION, a Florida Corporation,
Respondent.

BRIEF OF FLORIDA STEEL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

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INDEX

Introduction 1

Statement of Facts 3

The Question Presented 7

Argument 7

The Constitutional Question 10

Conclusion 11

Certificate of Mailing 12

Appendix—

Order Certifying Summary of Testimony for Record on Appeal A1

Excerpts from Minutes of Pretrial Conference Held Before Honorable Ralph O. Cullen, Circuit Judge, on September 20, 1967 ..... A5

Florida Appellate Rule 3.9(b) A6

Motion to Strike A6

Order of District Court, Third District A7

Motion to Quash A8

Table of Cases

Conrad v. *Jackson* (1958, Fla.), 107 So. 2d 369 9

Corrigan v. *Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 10

Fote v. *Moyer* (1953, Fla.), 63 Sc. 2d 622 7

Hartford Fire Ins. Co. v. *Hollis* (1909), 58 Fla. 268, 50 So. 985 7

Jaffe v. *Endure-A-Life Time Awning Sales, Inc.* (1957, Fla.), 98 So. 2d 77 7

Maistrosky v. *Harvey* (1961, Fla.), 133 So. 2d 103 7

State ex rel. Cartmel v. *Aetna Casualty & Surety Co.* (1922, Fla.), 84 Fla. 123, 92 So. 871 7

Town of Medley v. *Caplan* (1966, Fla.) 191 So.2d 449 9

U. S. v. *Johnson* (1946), 66 S.Ct. 464, 327 U.S. 106, 90 L.Ed. 562 8

OTHER AUTHORITIES

2 Fla. Jur., Appeals, § 290, page 629 7

24 ALR 1262 7

Florida Appellate Rule 3.9(b) 8

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Petitioners,

vs.

FLORIDA STEEL CORPORATION, a Florida Corporation,
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BRIEF OF FLORIDA STEEL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

INTRODUCTION

This brief is filed on behalf of the respondent, Florida Steel Corporation, in opposition to the petition for writ of certiorari filed in this Court by the petitioners, D. H.

Overmyer Warehouse Co., Inc., an Ohio corporation, Green & White Construction, Inc., a Delaware corporation, and Liberty Mutual Insurance Co., a Massachusetts corporation.

The petitioners, in toto, will be referred to in this brief as "petitioners," and the respondent, Florida Steel Corporation, will be referred to as "respondent." References to the appendix accompanying this brief will be by the symbol "App." References to the original record, which has been transmitted by the Clerk of the District Court of Appeal of Florida, Third District, to this Court, shall be by the symbol "R."

The petitioners seek to have this Court grant a writ of certiorari to the District Court of Appeal of Florida, Third District, on the grounds that they have been denied a State and Federal Constitutional right of due process and equal protection of the law.

Your respondent recovered a money judgment against the petitioners in a suit instituted in the Circuit Court of Dade County, Florida. Petitioners prosecuted an appeal of the final judgment to the District Court of Appeal of Florida, Third District, from said final judgment. The District Court of Appeal of Florida, Third District, dismissed petitioners' appeal as being frivolous and it is from this order of the District Court of Appeal of Florida, Third District, that the petitioners have filed their petition for writ of certiorari.

Respondent believes that a more detailed review of the facts of this case, as outlined in the record, is necessary in order to demonstrate that there is no basis for the issuance by this Court of a writ of certiorari.

STATEMENT OF FACTS

The respondent, Florida Steel Corporation, had been a materials supplier of steel joist products to a warehouse being erected by petitioner Green & White Construction Co., Inc., for petitioner D. H. Overmyer Warehouse Co., Inc. When Florida Steel's bill was not paid for the fabricated steel joists which had been furnished, it filed mechanic's liens under the Florida Mechanic's Lien Statute and thereafter instituted a suit to foreclose the mechanic's lien (R 1-11).

Under applicable Florida statute the claim of lien of Florida Steel Corporation was transferred to a bond upon which petitioner Liberty Mutual Insurance Co. was surety. By reason of the posting of this bond Liberty Mutual Insurance Co., along with D. H. Overmyer Warehouse Co., Inc., and Green & White Construction Co., Inc., became a principal defendant and a joint and several judgment was entered against each of said named parties (R 88-89).

No court reporter was present at the trial before the trial judge. There was, therefore, no transcript of the testimony that had been presented to the trial judge. Under applicable Florida procedural rules the trial judge entered an order certifying to a summary of the testimony which had been presented to him, which formed the basis of the record on appeal (See App. A1-A5; R 87(a)-87(d)).

At a pretrial conference held before the trial judge, the petitioners herein (defendants in the trial court), admitted the contract between the parties, admitted that Florida Steel performed the contract, and admitted that the amount claimed to be due was proper (See App. A5; R 53-54). At the pretrial conference, held four

days prior to the trial date, the petitioners herein for the first time moved to amend their answer to raise a question that the materials supplied by Florida Steel were defective. The request for amendment was granted by the trial court and the case actually went to trial on the question of whether or not the materials delivered by Florida Steel were defective. No claim was ever asserted by the petitioners herein in the trial court that the materials delivered by Florida Steel were not in compliance with any Metropoliitan Dade County, Florida building ordinance, nor did the petitioners offer any proof in the trial court of any ordinances of Metropolitan Dade County, Florida.

The petitioners' brief in the District Court of Appeal of Florida, Third District. was directed solely to the issue that the fabricated steel that had been furnished by Florida Steel Corporation was not in compliance with the building code of Metropolitan Dade County. Attached to the brief was the South Florida Building Code as adopted by the Board of County Commissioners of Dade County, Florida, a Manual of Steel Construction published by the American Institute of Steel Construction, Inc., and excerpts from a book entitled Building Failures—Case Studies in Construction and Design, by Thomas H. McKaig. None of these exhibits had been offered in evidence before the trial court, nor was the issue of the applicability of the South Florida Building Code (a municipal ordinance), ever presented to the trial court.

The respondent, as appellee in the District Court of Appeal of Florida, Third District, pursuant to Florida Appellate Rule 3.9, filed a motion to strike appellants' brief. Rule 3.9 is set out in App. A6. The motion to strike pointed out that the exhibits attached to the brief of the petitioners (appellants in the District Court of Ap-

peal) were dehors the record in the trial court and therefore should not be considered by the District Court of Appeal on review of the final judgment of the trial court (App. A6).

The District Court of Appeal considered the motion to strike and struck the exhibits which were attached to the brief of the appellants (petitioners herein) (App. A7; R 96).

The appellants (petitioners herein) did not deem it appropriate to file a new brief after the District Court of Appeal had stricken the exhibits attached to their brief. The respondent herein (appellee in the District Court of Appeal) then filed its brief directed to the merits of the cause, in which it was pointed out that the order of the trial judge certifying a summary of the testimony for the record on appeal (App. A1-A5; R 87(a)-87(d)) established the following:

> (a) That the petitioners herein (defendants in the trial court) did not dispute the amount claimed to be due by Florida Steel;
>
> (b) That the petitioners herein (defendants in the trial court) did not dispute that Florida Steel had complied with all of the requirements of the Florida Mechanic's Lien Statute;
>
> (c) That the petitioners herein (defendants in the trial court) had never made any complaint to Florida Steel prior to the amendment of their answer four days prior to trial that the fabricated steel joists delivered by Florida Steel to the job site were in any way defective;
>
> (e) That all of the inspections of the steel joists made by the expert witnesses of the petitioners herein (defendants in the trial court) were made long after

the material had been delivered, the warehouse completed and occupied by D. H. Overmyer Warehouse Co., Inc. (App. A1-A5; R 87(a)-87(d)); and

(f) There was conflict in the testimony of the experts as to whether or not there were even any defects at all and the cause of such defects. At best, the examination of the experts testifying in behalf of the petitioners (defendants in the trial court) was a cursory examination from the floor of the warehouse.

The petitioners herein (appellants in the District Court of Appeal) did not file a reply brief to the brief filed by the appellee (respondent herein) in the District Court of Appeal. The District Court of Appeal, faced with this state of the record and the briefs before it, re-examined the case and entered the following order:

"The court having examined the briefs submitted and it appearing that the court has heretofore considered a motion of the appellee to strike appellants' brief and has stricken the exhibits attached thereto as not being a part of the record on appeal, and it further appearing that inasmuch as said exhibits are not a part of the record on appeal, the points presented upon appeal may not be considered by the court; therefore, the appeal is frivolous, whereupon, this appeal is quashed." (R 98)

Petitioners herein filed a petition for rehearing in the District Court of Appeal, which was denied (R 99). The petitioners then filed a petition for writ of certiorari in the Supreme Court of Florida, which was denied (R 105), and thereafter filed a petition for rehearing in the Supreme Court of Florida, which was also denied (R. 106).

THE QUESTION PRESENTED

Has the District Court of Appeal of Florida, Third District, Unconstitutionally Denied the Petitioners the Right of Appeal Guaranteed by the Florida Constitution and Thereby Denied the Petitioners Their Constitutional Right to Due Process of Law and Equal Protection?

ARGUMENT

It is respectfully submitted that this petition for a writ of certiorari is equally as frivolous as the appeal which was dismissed by the District Court of Appeal of Florida, Third District. It is elementary that an appellant in any appellate proceeding must present some kind of a justiciable controversy to the appellate court for its review. The appellant has the duty of demonstrating that the trial court has in some way committed error, either in fact or in law.

It is the rule of the Florida courts, as well as the general rule of appellate procedure in this Court, that the appellate court will confine the parties to points raised and determined in the trial court and will not permit parties to raise points or grounds for the first time in the appellate court. *Hartford Fire Ins. Co.* v. *Hollis* (1909), 58 Fla. 268, 50 So. 985; *Jaffe* v. *Endure-A-Life Time Awning Sales, Inc.* (1957, Fla. Supreme Court), 98 So. 2d 77; 2 Fla. Jur., Appeals, § 290, page 629. Neither will the court grant trial de novo to the appellant. *State ex rel. Cartmel* v. *Aetna Casualty & Surety Co.* (1922, Fla. Supreme Court), 84 Fla. 123, 92 So. 871, 24 ALR 1262; and *Fote* v. *Moyer* (1953, Fla. Supreme Court), 63 So. 2d 622. The appellate court is also confined in its review to the record produced on appeal. *Maistrosky* v. *Harvey* (1961, Fla. App.), 133 So. 2d 103.

As heretofore pointed out, Florida Appellate Rule 3.9(b) specifically authorizes the quashing of an appeal on the ground that it is frivolous.

This Court has recognized the validity of such a rule in the case of *U. S.* v. *Johnson* (1946), 66 S.Ct. 464, 327 U.S. 106, 90 L.Ed. 562, in which this Court said:

> "The appeal to the Circuit Court of Appeals was instituted by notice of appeal under Rule III of the Criminal Appeals Rules. Rule IV gives the Circuit Court of Appeals power to supervise and control all proceedings on the appeal and to expedite such proceedings by, among other things, entertaining motions to dismiss. Ray v. United States, 301 U.S. 158, 164, 57 S.Ct. 700, 703, 81 L.Ed. 976; Mortensen v. United States, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331. Under that Rule the Circuit Court of Appeals here after studying the issues raised and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous.[6]" (Citing many authorities in the footnote.)

It is petitioners' contention that they have been denied their constitutional rights of due process and equal protection of the law because the District Court of Appeal of Florida, Third District, quashed their appeal as being frivolous. The petitioners' entire brief in the District Court of Appeal was directed to an examination of the building code, which is a municipal ordinance, the specifications of the American Institute of Steel Construction, which is referred to in the building code, and excerpts from a book entitled Building Failures—Case Studies in Construction and Design.

It is the law of Florida that a court cannot take judicial notice of municipal ordinances. As was stated in the case

of *Conrad* v. *Jackson* (1958, Supreme Court of Florida), 107 So. 2d 369, in speaking of the necessity of offering proof of municipal ordinances—

> "It is necessary that we point up a deficiency in the proofs with reference to the zoning ordinance. Nowhere in the record do we find that the municipal zoning ordinance was ever placed in evidence. The parties refer to it and liberally quote from it in their briefs. In other respects, save for the opinion of the Chancellor, this court is completely in the dark as to the content of the ordinance. It simply does not appear in the record. The established rule is that courts cannot take judicial cognizance of municipal ordinances. We consequently cannot inquire into the provisions of an ordinance which is not before us. Stephens v. Anderson, 75 Fla. 575, 79 So. 205; State ex rel. Kay v. City of Miami, 158 Fla. 26, 27 So.2d 413."

which has been followed by the District Court of Appeal of Florida, Third District, in *Town of Medley* v. *Caplan* (1966, Fla. App.), 191 So. 2d 449.

The record in this cause being totally devoid of any showing that the South Florida Building Code (the ordinance in question) had even been mentioned in the trial court, much less properly offered in evidence, the District Court of Appeal of Florida, Third District, had no choice but to strike the unauthorized exhibits the petitioners herein had attempted to attach to their brief. The petitioners herein did not choose to file an additional or supplemental brief before the District Court of Appeal, but chose to let the matter rest in that court on the brief they had originally filed.

The entire brief of the petitioners herein (appellants in the District Court of Appeal) was bottomed on their argument that steel joists delivered by Florida Steel (respondent herein) violated the South Florida Building Code, which building code had not been offered in evidence in the trial court.

The building code not being a part of the record in the cause, nor having been mentioned or presented as a defense in the trial court, there was no demonstration by the appellants (petitioners herein) that the trial court had committed any error whatsoever, much less a demonstration that the trial court had committed reversible error.

The petitioners herein claim that their constitutional rights have been violated, in that they have been denied a right of appeal by the action of the District Court of Appeal. Nothing could be further from the truth, as disclosed by this record. The petitioners were not denied a right of appeal. They had an appeal. The District Court of Appeal considered what the appellant had presented and determined that under the record and the briefs as filed that the petitioners herein (appellants in the District Court of Appeal) had wholly failed to demonstrate error and that, therefore, their appeal should be dismissed in accordance with applicable appellate rules on the ground that such appeal was frivolous.

THE CONSTITUTIONAL QUESTION

It is respectfully submitted that this case falls directly within the purview of the comments made by this Court in the case of *Corrigan* v. *Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969, in which this Court stated:

> "The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this Court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. Sugarman v. United States, 249 U.S. 182, 184, 39 S.Ct. 191, 53 L.Ed. 550; Zucht v. King, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194. And under well settled rules, jurisdiction is wanting if such questions are so unsub-

stantial as to be plainly without color of merit and frivolous. Wilson v. North Carolina, 169 U.S. 586, 595, 18 S.Ct. 435, 42 L.Ed. 865; Delmar Jockey Club v. Missouri, 210 U.S. 324, 335, 28 S.Ct. 732, 52 L.Ed. 1080; Binderup v. Pathé Exchange, 263 U.S. 291, 305, 44 S.Ct. 96, 68 L.Ed. 308; Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750, No. 200, decided April 12, 1926."

CONCLUSION

It is respectfully submitted that the record in this cause clearly demonstrates that the petitioners herein have been given a full and fair opportunity to present their defenses in the trial court and to present their case to the District Court of Appeal of Florida, Third District. The problem the petitioners herein encountered in the District Court of Appeal is the same problem, it is respectfully submitted, that they face in this proceeding, that is, that there is no substance to their claim and the same has all the earmarks of being frivolous.

The petitioners have wholly failed to demonstrate any violation of their constitutional rights of due process and equal protection.

It is respectfully submitted that the question presented by the petitioners is so insubstantial as to be plainly without color of merit and is frivolous, and that this Court should, therefore, deny jurisdiction.

Respectfully submitted,

ROBERT C. WARD
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Of Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing brief was furnished to the following:

Cotton Howell, Esquire
Shutts and Bowen
First National Bank Building
Miami, Florida
Attorney for Petitioners

Russell Morton Brown, Esquire
Brown, Goodpasture & Block
Federal Bar Building
Washington, D. C.
Attorney for Petitioners

by mail, by depositing the same in a United States mail box, with first class postage prepaid affixed, appropriately addressed, to the foregoing counsel for the petitioners, on the ..... day of January, 1969.

.....

ROBERT C. WARD

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

ORDER CERTIFYING SUMMARY OF TESTIMONY FOR RECORD ON APPEAL

This cause came on for hearing on motion of the defendants to certify summary of testimony for record on appeal and it appearing to the Court that the respective parties hereto have filed proposed summary of testimony and the Court having considered said summaries and made findings where the proposed summaries were not in accord, the Court finds that the following summary of testimony is the true and correct testimony taken at the trial of this cause on Thursday, September 28, 1967:

PLAINTIFF'S WITNESSES

1. JAMES E. VINCENT, Sales Manager of plaintiff, testified that the amount due, including extras, was $23,-243.78, and that the interest to the date of trial was $1,019.00. He further testified that no complaints were made by defendants regarding any defects in the material, or any objections to the invoices.

2. JOSEPH G. ROGERS, Credit Manager of plaintiff, also gave the amount of the account, plus interest due and stated that demand had been made for payment, but that no payment had been made. He also testified that no objections had ever been made to the invoices covering the account.

3. WALTER G. STEPHAN was qualified as an expert engineer. He was formerly an inspector for Dade

County, Florida. He examined the joists on Wednesday, September 20, 1967. He stated that he saw all the joists involved, and used a ladder to make a close inspection. He further stated that the joists were in good shape, and had no defects.

On cross-examination, he stated that some of the joists were bowed, but stated that the curves were not more than one inch, which he states is the accepted standard of tolerance for this kind of joists. He also stated that it was not important to keep the joists in a straight line, as long as the bottom and top beams are bowed together.

4. FRED A. WHITEHEAD, Superintendent in charge of erection of the joists done by subcontractor, M. R. Harrison Construction Co. He stated that he examined the joists before and after they were installed, that he supervised the installation of said joists, and that there were no defects either before or after installation. He further stated that personnel of Green and White Construction Company, the general contractor, inspected the joists after they were installed, and that no complaints were made. He also stated that an engineer employed by the construction company inspected the joists after installation, and that no complaints were made.

5. MORT PODELL was qualified as an expert attorney and testified that in his opinion a reasonable fee for services to counsel for plaintiff in this case would be between $4500 and $5500.

6. SHALLE S. FINE was qualified as an expert attorney, and testified that in his opinion a reasonable fee for services to counsel for plaintiff in this case would be between $5000 and $6000.

DEFENDANTS' WITNESSES

1. The defendants admitted that the plaintiff complied with all the requirements of the Mechanic's Lien Statute, and waived all proof thereof.

2. PAUL E. KORNMAN, 4212 Wisconsin Avenue, Tampa, Florida, was qualified as an expert professional engineer. He is a professional engineer licensed in Florida and thirty-five other states. During the material period herein, he was a consulting engineer for the defendant, D. H. Overmyer Warehouse Company.

He examined the joists involved in this dispute in June of 1967, and shortly before the trial. His method of inspection was by looking up from the ground and making a visual inspection. He found ninety-three of the joists were defective. The defects consisted of the following: (a) some were not vertical, that is the lower steel beam was not in line with the upper beam of the joists, (b) the ends were bent, and (c) the joists were bowed. He testified that the defects could have been caused by fabrication error or an erection error, but that in his opinion the defects enumerated were fabrication defects and not erection defects. He was then asked, on direct, whether he knew what the cost of properly repairing said defects would be. Counsel for the plaintiff objected on the grounds that the witness was not qualified as an expert as to repair costs. The trial court reserved ruling on the objection and the witness testified that he had a "guess" as to what the repair cost would be. Counsel for plaintiff objected to that on the grounds that a mere guess would be speculative, irrelevant and immaterial. The trial court permitted the witness to answer the question. The witness testified that the cost of properly repairing said defects would be $50 per joist, or a total of $4650.

3. WILLIAM J. NIXON, 1437 Overlea Drive, Clearwater, Florida, was qualified as an expert in general construction. He acted as a consultant in the job in controversy for D. H. Overmyer Warehouse Company. He examined the joists in dispute in August 1967. He testified that the tails of the bar joists were hooked resulting in the bottom chord of the joists being out of vertical alignment with the top chord, and thereby creating a possible structural failure. He stated that the difference of one inch out of vertical alignment could cause failure on these jobs. He stated that the joists were defective in that they were out of plumb, and were bowed; and that in his opinion the defects were fabrication defects and not erection defects and that they could be repaired. The witness testified that he had built, or was involved in, the construction of at least 100 warehouses for D. H. Overmyer Warehouse Company, and that it was the practice in the construction of these warehouses to have an inspection of the joists before they were erected, and an inspection of the joists after the erection, and that if a defect was present at the time of erection, the fabricator or erector would be notified before or at the time the erection was finished.

4. JIM McGEHEE, 50 N.E. 181 Street, Miami, Florida, is an employee of D. H. Overmyer Warehouse Company. He testified that he examined the joists one week before the trial and could observe with his naked eye that many of the joists were out of line, bowed and bent. He also testified that a certificate of occupancy had been issued to the subject warehouse, and that the warehouse was completed in January of 1967 and was and still is being used and occupied.

5. BARRY KUTUN was qualified as an expert attorney and testified that in his opinion a reasonable fee for services to counsel for plaintiff in this case would be between $1500 and $2000.

There was no further testimony.

DONE AND ORDERED this 23rd day of January, 1968, at Miami, Dade County, Florida.

Ralph O. Cullen
Circuit Judge

EXCERPTS FROM MINUTES OF PRETRIAL CONFERENCE HELD BEFORE HONORABLE RALPH O. CULLEN, CIRCUIT JUDGE, ON SEPTEMBER 20, 1967

THE COURT: Can we stipulate that the plaintiff can have these papers identified—as to the invoices or whatever they are—and put it in evidence and then rest?

MR. HOWELL: Yes, sir. In other words, we admit the contract; that they performed under the contract; and the amount is not disputed other than—

THE COURT: The amount of the claim. There is no controversy over that?

MR. HOWELL: That is correct, other than our claim of defective material.

THE COURT: That is right.

MR. GLASER: Once we introduce the contracts and the delivery tickets—

MR. HOWELL: That is all you have to do.

MR. GLASER: That is all we have to do.

THE COURT: And have them testify that they have not been paid.

MR. GLASER: Yes, sir.

THE COURT: Then we can go right to these defenses.

MR. GLASER: The late delivery and the—

MR. HOWELL: That is right.

[Whereupon, the pretrial conference was concluded.]

FLORIDA APPELLATE RULE 3.9(b)

b. **Motion to Quash Appeal.** Where appropriate, the appellee may file with the clerk of the court, a written motion to quash the appeal on the ground that the same is frivolous or taken only for the purpose of delay.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT.

MOTION TO STRIKE

THE APPELLEE, FLORIDA STEEL CORPORATION, by and through its undersigned attorneys, respectfully moves the Court, pursuant to Rule 3.9 of the Florida Appellate Rules, for an order to strike appellants' brief and shows in support of this motion, the following:

1. The appellants' brief sought to be stricken recites matters and contains exhibits which are dehors the record.

2. The exhibits attached to the appellants' brief were not introduced into evidence at the trial below.

3. A certified copy of the index to the record on appeal is attached hereto and made a part hereof.

4. The trial in this cause was held without the presence of a court reporter, and the trial court entered an order certifying a summary of testimony for the Record-on-Appeal. A certified copy of that order is attached hereto and made a part hereof.

5. Appellate review is confined to the Record-on-Appeal and it is improper for counsel, on appeal, to insert in the brief matters and things which were not a part of the trial record, and which have not been brought to the

attention of the trial court for consideration. *Sheldon* v. *Tiernan,* 147 So. 2d 593 (Fla. 2nd D.C.A. 1962); *Florida Livestock Board* v. *Hygrade Food Products Corporation,* 141 So. 2d, 6 and 7 (Fla. 1st D.C.A. 1962); *Maistrosky* v. *Harvey,* 133 So. 2d 103, 105 (2nd D.C.A. 1961); *Kelly* v. *Kaufman,* 101 So. 2d 909, 911 (Fla. 3rd D.C.A. 1958).

SIBLEY, GIBLIN, LEVENSON & WARD
Attorneys for Appellee
605 Lincoln Road
Miami Beach, Florida 33139
By: /s/ ALLAN M. GLASER
(*Of Counsel*)

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the foregoing was mailed to Shutts & Bowen, Esqs., Attorneys for Appellants, 1000 First National Bank Building, Miami, Florida 33131, on this the ..... day of March, 1968.

/s/ ALLAN M. GLASER

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

WEDNESDAY, MARCH 27, 1968

This cause having come on for hearing on appellee's motion to strike appellants' brief, and the court having considered same, it is ordered that said motion is granted in part, as to the challenged exhibits attached to appellants' brief and such exhibits are hereby stricken.

It is further ordered that appellee's motion to quash appeal is denied.

A True Copy

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal,
Third District

cc: Sibley, Giblin, Levenson & Ward
Shutts & Bowen
/h

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

MOTION TO QUASH

THE APPELLEE, FLORIDA STEEL CORPORATION, by and through its undersigned attorneys, respectfully moves the Court, pursuant to Rule 3.9 (b) of the Florida Appellate Rules, for an order quashing this appeal and shows in support of its motion, the following reasons:

1. This appeal presents to this Court, by virtue of appellants' brief, and assignments of error which he relies upon, the following basic question:

> Whether or not the trial court erred in rendering judgment for the plaintiff when the record affirmatively showed that the steel joists furnished violated the specifications of the Dade County Building Code.

2. The conclusions of the trial judge come before the appellate court clothed with a presumption of correctness, and the appellate court should not substitute its judgment for that of a chancellor when the record contains substantial evidence to support his conclusions. *Bowen* v. *Everett*, 205 So. 2d 536 (Fla. 2nd D.C.A. 1967); *Rose* v. *Grable*, 203 So. 2d 648, 649 (Fla. 3rd D.C.A. 1967); *Miami Beach First National*

Bank v. *Shalleck*, 182 So. 2d 649, 650 (Fla. 3rd D.C.A. 1966); *Lane* v. *Most Worshipful Union Grand Lodge, etc.*, 180 So. 2d 187, 188 (Fla. 1st D.C.A. 1965); *LaFrance Cleaners & Dyers, Inc.* v. *Argenio*, 147 So. 2d 330, 331 (Fla. 3rd D.C.A. 1962); *Bruggisser* v. *Bruggisser*, 133 So. 2d 654, 655 (Fla. 3rd D.C.A. 1961); *Bell* v. *Bell*, 81 So. 2d 536 (Fla. 1955).

3. A brief examination of the record is all that is necessary to demonstrate that this appeal is a frivolous one.

4. The trial of this cause in the lower court was held without the presence of a court reporter, and the trial court entered an order certifying a summary of testimony for the Record-on-Appeal. A certified copy of that order is attached hereto and made a part hereof. From a brief examination of that summary of testimony, which serves as the Record-on-Appeal, it is patently obvious that there was substantial competent evidence to support the entry of a final judgment in favor of the plaintiff, and that there is no merit to the sole point of law relied on for reversal by appellants and which the appellants attempt to support in their brief by facts and exhibits which are dehors the record.

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By: /s/ ALLAN M. GLASER
(Of Counsel)

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the above and foregoing was mailed to Shutts & Bowen, Esqs., attorneys for appellants, at 1000 First National Bank Building, Miami, Florida, 33131, on this the 4th day of March, 1968.

/s/ ALLAN M. GLASER